LOH HOLDINGS SDN. BHD.

v.

DATUK YEAP KEE AIK & ORS.

HIGH COURT MALAYA, MELAKA
WAN YAHYA J
[CIVIL SUIT NO. 111 OF 1980]
20 MARCH 1982

CONTRACT: *Sale of share - Refusal by shareholders to proceed with contractual obligations - Subsequent agreement to sell company land to 6th defendant - Caveat against defendant company's land removed - Action by plaintiff struck out - Plaintiff sued again - Whether pleas of res judicata equitable estoppel available to defendant company and 6th defendant - Whether plaintiff had any cause of action in tort of inducing breach of contract.*

The 1st, 2nd, 3rd and 4th defendants were shareholders of the 5th defendant. The 1st defendant was also one of its directors. In 1977 the 1st and 2nd defendants, on behalf of themselves and the 4th and 5th defendants, as holders of the ordinary shares of the 5th defendant, entered into an agreement with the plaintiff whereby they agreed to sell to the plaintiff all their shares in the 5th defendant. Consequently the defendants refused to proceed with their contractual obligations, whereupon the plaintiff entered a caveat against the 5th defendant's land.

In 1979, on the 5th defendant serving a notice on the plaintiff of intended removal of the caveat under s. 326 of the National Land Code, the plaintiff by *ex parte* originating summons applied for extension of his caveat. In his affidavit he stated *inter alia* that he had a good cause of action against the 5th defendant and that he would be taking out a writ against the defendant within three months of the order. The extension was granted until the final determination of the case. The plaintiff subsequently took out writ *vide* Civil Suit No. 92/79.

The 5th defendant applied for the removal of the caveat under s. 326 of the National Land Code and to strike out the claim made by the plaintiff (Civil Suit No. 92/79) pursuant to O. 19 r. 27 or O. 25 r. 4. Both applications came up for hearing before the Court. The Court found in favour of the 5th defendant and accordingly made an order for the plaintiff's suit(Civil Suit No. 92/79) to be struck out but made no order for the claim for wrongful entry of caveat. The decision to strike out the case was based on the finding that the concluded agreement was not between the plaintiff and the shareholders of the 5th defendant company. As the agreement was for the sale of shares by the shareholders and not the 5th defendant company, the company could not be a party to the agreement and therefore there was no cause of action against it.

There was no appeal against the above order. Soon after the striking out of Civil Suit No. 92/79, the plaintiff took out another writ (Civil Suit 111/80) which was the subject matter of the proceedings before the Court. The 5th defendant immediately filed an application to strike out the proceedings against it. So did the 6th defendant, with whom the 5th defendant had entered into an agreement in June 1979 for the sale of the plaintiff's land in Melaka.

The plaintiff applied for an injunction to restrain the 5th defendant from disposing of the company's only asset, the land in Melaka. The parties agreed to have the application by the 5th and 6th defendants heard first and until the conclusion of those proceedings, they consented to an interim injunction being made out. An order to that effect was made out.

The grounds relied on by the 5th and 6th defendants in their application to strike out the proceedings (Civil Suit 111/80) were (i) *res judicata* and issue of estoppel (ii) absence of any cause of action against them. The plaintiff, on the other hand, argued that *res judicata* did not apply and that the cause of action was founded on the tort of inducing breach of contract.

Held:

[1] *Res judicata and issue of estoppel were applicable.*

(i) The same question was in issue in both proceedings. The prayer in Civil Suit No. 92/79 was for an injunction to restrain the 5th defendant from disposing the company's land in Melaka and for damages. Identical prayer appears in Civil Suit 111/80. In both cases the object was to compel the shareholders to honour their part of the obligation to the agreement and to prevent the company's land from being disposed off to a third party. The plaintiff was aware not only of the identity of the 6th defendant but also of the alleged infringement of his rights by the latter. By not citing and including the 6th defendant in the earlier case and by omitting to take the course of action then open and available against the 6th defendant, the plaintiff was estopped from raising such issues in his subsequent suit. [*Phosphate Sewage Co. Ltd. v. Molleson* [1879] IV AC 810; *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74 at p. 76; *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581]

(ii) The decision in Civil Suit No. 79/79 was final. The final order was for the suit to be struck out and the caveat removed. No appeal was filed in respect of either order.

(iii) The parties were the same. In the case of the 5th defendant he was cited as the defendant in both actions. The 6th defendant's name did not appear in the former suit but then he derived his right through the 5th defendant and therefore could be deemed as his privy.

[2] Assuming that *res judicata* did not apply to either the 5th or 6th defendant, there was however no cause of action against either of them. There was no inducement by either of them for breach of the contract existing between the plaintiff and the shareholders. A defendant is only liable in the tort of procurement or inducement to breach an agreement if he acts with knowledge of the contract and with intention of procuring its breach, and :

(i) Directly intervenes by persuading a party to the contract to break it;

(ii) Intervenes by committing same wrongful act which has the effect of preventing a party from performing his part of the contract;

(iii) Intervenes by persuading a third party to perform a wrongful act so as to render impossible the performance of the contract by one of the parties to that contract. [*D.C. Thomson & Co. Ltd. v. Deakin & Ors.* [1952] 1 Ch 646; *Stratford & Sons Ltd. v. Lindley* [1965] AC 269].

(a) There was no intention of procurement or inducement of breach the agreement on the part of the 5th defendant. Though the 5th defendant was aware of the Peglin/ Datuk Yeap Kee Aik agreement and could be deemed to have knowledge of it, it could not be imputed with the fraudulent intention which the 1st defendant might have had entertained at that time. Company as a *persona ficta* can only act through its agents or servants and the knowledge of a fraudulent agent cannot be imputed to its principal [*Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85 at 88 and *Belmont Finance Corporation*

Ltd. v. Williams Furniture Ltd. & Ors. [1979] 1 All ER 118 at 126 applied; *Lennard's Carrying Co. v. Asiatic Petroleum Co. Ltd.* [1915] AC 705 and *The Lady Gwendolen* [1965] P 294 CA considered].

(b) Furthermore, there could be no constructive conspiracy between the 5th defendant and the 1st defendant, as the act of the 1st defendant, who was the managing director of the 5th defendant, was really the act of the 5th defendant. No third party was involved. There can be no conspiracy between a company and a person who is the sole responsible person in the company. [*Regina v. McDonnel* [1966] 1 QB 233].

(c) No inference of intention to procure or induce, nor any contrary inference, can be drawn from certain clauses in the Peglin/Ricwal agreement. On reading the clauses it was obvious that the 5th and 6th defendants were aware of the caveat lodged by the plaintiff and had entered into a conditional agreement in the expectation of the caveat being removed by the Court. That was not an inducement to the 1st, 2nd, 3rd and 4th defendants to breach their agreement with the plaintiff.

(d) Neither was the act of entering into the agreement in itself wrongful. The land was registered in the name of the 5th defendant and not the shareholders. The 5th defendant was entitled to buy it.

(e) In no way did the execution of the Peglin/Ricwal agreement prevent either party, the plaintiff or the shareholders, from carrying out the contract or render its performance impossible. The agreement was for the sale of shares and the plaintiff could still compel the 1st to 4th defendants to transfer their shares to him.

Accordingly, an order in terms of the defendants' application was to be made and an order for the removal forthwith of the interim injunction made at the commencement of the proceedings was also to be made. The applicants were entitled to costs.

Cases referred to:
Phosphate Sewage Co. Ltd. v. Molleson [1879] IV AC 810
Government of Malaysia v. Dato Chong Kok Lim [1973] 2 MLJ 74
Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. [1975] AC 581
D.C. Thomson & Co. Ltd. v. Deakin & Ors. [1952] 1 Ch 646
Stratford & Sons Ltd. v. Lindley [1965] AC 269
Doshi v. Yeoh Tiong Lay [1975] 1 MLJ 85
Belmont Finance Corporation Ltd. v. Williams Furniture Ltd. & Ors. [1979] 1 All ER 118
Lennard's Carrying Co. v. Asiatic Petroleum Co. Ltd. [1915] AC 705
The Lady Gwendolen [1965] P 294
Regina v. McDonnel [1966] 1 QB 233

Legislation referred to:
National Land Code Act 56/1965, s. 326
Rules of the High Court 1980, O. 19 r. 27, O. 25 r. 4

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For the defendants 1, 2, 3, 4 & 5 - R.R. Sethu
For the defendant 6th - John Gurusamay

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Also found at [1982] CLJ 551